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HASMAH ABDUL RAHMAN

v.

KENNY CHUA KIEN LAM

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COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: W-02-739-2004]

C

15 MAY 2006

SECURITIES: *Shares - Sale and purchase of - Whether purported sale amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful*

D

end' - Whether transaction tainted with illegality and unenforceable - Consequences of such an impugned transaction

COMPANY LAW: *Shares - Sale of shares - Whether purported sale amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful*

E

end' - Whether transaction tainted with illegality and unenforceable - Consequences of such an impugned transaction

CONTRACT: *Illegality - Deception - Shares, sale of - Whether purported sale amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end' - Whether transaction tainted with illegality and unenforceable - Consequences of such an impugned transaction*

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This was an appeal by the appellant against the learned High

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Court judge's decision allowing the appeal by the respondent against the decision of the learned senior assistant registrar allowing the appellant's application to strike out the respondent's action pursuant to O. 18 r. 19 of the Rules of the High Court 1980. The core of the dispute was on the sale of shares in a

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company involved in the logging business called SBBS (formerly known as Syarikat Binaan Budi Sawmill Bhd), of which the respondent was the managing director at all material times. The respondent, having tried unsuccessfully to float SBBS on the Second Board of the then Kuala Lumpur Stock Exchange

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('KLSE'), made a second attempt with the assistance of the appellant. As the respondent had to comply with several requirements by the Securities Commission ('SC'), the KLSE and

the relevant provisions of the Companies Act 1965 and the Securities Commission Act 1993, the respondent and the appellant executed certain statutory declarations and delivered the same to the SC and the KLSE. SBBS was successfully listed in the Second Board. The thrust of the respondent's claim was that since he was the wholly beneficial owner of the shares in SBBS, the appellant was merely a trustee of the shares held by her in SBBS. Since the legality or illegality of the transaction, whether in the form of trust or contract, would determine the standing of the respondent's claim against the appellant, this appeal was heard on that premise alone.

Held (allowing the appeal)
Per Richard Malanjum JCA:

(1) The appellant took the position to accept as correct all the assertions in the respondent's statement of claim and there was also no rebuttal by the respondent as to the truth of the averment that he affirmed several statutory declarations containing assertions which would have given the impression to the listing approving authorities that the transaction was genuine. Hence, this case fell squarely within one of the legal principles endorsed by this court in *Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors And Another Appeal.* (para 17)

(2) In the instant case, it was not denied that the statutory declarations affirmed by the respondent and the appellant contained assertions which, if juxtaposed with the assertions by the respondent in the statement of claim, must have been intended at the material time to mislead the SC and the KLSE to approve the floating of SBBS on the Second Board. Hence, the purported sale of the shares in SBBS from the respondent to the appellant amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end'. There was indeed a deception practised on the relevant approving bodies, which were part and parcel of the public administration in this country. Indeed, the respondent had come to seek assistance from the court with unclean hands. The transaction was, therefore, tainted with illegality right from the start and thus unenforceable. (paras 26 & 27)

(3) As in *Fusing Construction (supra)*, the question of the role played by the appellant in the impugned transaction would be quite irrelevant. The appellant was already the registered owner of the shares and she denied that they belonged to a third party, much less to the respondent. In any event, the consequence of any declared illegal transaction is commonly denoted by the maxim 'the loss lies where it falls'. In this case, it was thus inevitable to 'let the transacted shares and the rights and bonus issues shares lie where they fall'. (para 28)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu terhadap keputusan yang arif hakim Mahkamah Tinggi kerana membenarkan rayuan responden terhadap keputusan yang arif penolong kanan pendaftar yang membenarkan permohonan perayu untuk mengenepikan tindakan responden di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Pertikaian pada asasnya adalah berpunca dari penjualan saham sebuah syarikat yang terlibat dalam pembalakan yang dikenali sebagai SBBS (dahulunya Syarikat Binaan Budi Sawmill Berhad), di mana responden pada setiap masa material adalah pengarah urusannya. Responden gagal mengapongkan SBBS di Papan Kedua Bursa Saham Kuala Lumpur ('KLSE'), dan berikutnya mencuba sekali lagi untuk berbuat demikian dengan bantuan perayu. Oleh kerana responden perlu mematuhi beberapa syarat yang dikenakan oleh Suruhanjaya Sekuriti ('SC') dan KLSE, serta syarat-syarat yang diperuntukkan di dalam Akta Syarikat 1965 dan Akta Suruhanjaya Sekuriti 1993, responden dan perayu telah memeterai beberapa akuan berkanun dan mengemukakannya kepada SC dan KLSE. SBBS kemudian disenaraikan di Papan Kedua. Inti tuntutan responden adalah bahawa, oleh kerana beliau merupakan pemilik benefisial bagi keseluruhan saham-saham di dalam SBBS, maka perayu hanyalah pemegang amanah bagi saham-saham tersebut. Apapun, oleh kerana kesahan atau ketidaksahan transaksi, sama ada dalam bentuk amanah atau kontrak, akan menentukan kedudukan tuntutan responden, maka rayuan di sini berkisar pada sudut itu sahaja.

Diputuskan (membenarkan rayuan)
Oleh Richard Malanjum HMR:

(1) Perayu mengambil pendirian untuk menerima sebagai betul semua pengataan responden dalam pernyataan tuntutannya. Juga tidak terdapat penyangkalan oleh responden mengenai

pengataannya bahawa beliau telah membuat beberapa akuan berkanun yang mengandungi ungkapan yang memberi gambaran kepada badan yang meluluskan penyenaraian bahawa transaksi adalah tulin. Oleh itu, kes di sini dirangkum sepenuhnya oleh salah satu prinsip undang-undang yang disahkan oleh mahkamah ini dalam *Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors.*

(2) Dalam kes semasa, tidak dinafikan bahawa akuan-akuan berkanun yang dibuat oleh responden dan perayu mengandungi kata-kata yang, jika diperbandingkan dengan kata-kata responden dalam pernyataan tuntutannya, semestinya pada waktu material bertujuan untuk memesong SC dan KLSE supaya meluluskan pengapongan SBBS di Papan Kedua. Dengan itu, cubaan penjualan saham-saham SBBS oleh responden kepada perayu adalah tidak lebih dari 'satu transaksi yang walaupun pada luarannya kelihatan sah, tetapi dimeterai untuk tujuan yang tak sah atau bagi mencapai matlamat yang tak sah'. Tidak syak lagi, suatu perdayaan telah dilakukan terhadap badan yang meluluskan yang merupakan sebahagian dari pentadbiran awam negara ini. Maka responden telah datang ke mahkamah ini untuk memohon bantuan dengan tangan yang terpalit kekotoran. Transaksi telah dikotori ketaksahan sejak awal lagi dan kerana itu tidak boleh dilaksanakan.

(3) Sepertimana di dalam *Fusing Construction (supra)*, soal berkaitan peranan yang dimain oleh perayu di dalam transaksi yang dicabar adalah tidak berapa relevan. Perayu sudahpun menjadi pemilik berdaftar saham-saham dan beliau menafikan bahawa ianya dimiliki oleh mana-mana pihak ketiga, termasuk responden sendiri. Apapun, akibat dari transaksi yang diisytihar sebagai tak sah adalah seperti yang lazim dikata oleh maxim 'kerugian terletak di tempat di mana ianya jatuh'. Dalam kes semasa, satu-satu pilihan yang ada hanyalah untuk 'membiarkan saham-saham yang diniaga serta terbitan-terbitan hak dan bonus berada ditempat dimana ianya jatuh'.

Case(s) referred to:

Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors And Another Appeal [2000] 3 CLJ 341 CA ***(foll)***

Suntoso Jacob v. Kong Miao Ming [1986] 2 MLJ 170 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19
Securities Commission Act 1993, ss. 32B, 32(6)

For the appellant - C Abraham; M/s Shearn Delamore & Co
For the respondent - Gideon Tan; M/s Gideon Tan Razali Zaini

[Appeal from High Court, Kuala Lumpur; Writ Summons No: D7-22-957-2002]

Reported by Suresh Nathan

JUDGMENT

Richard Malanjum JCA:

Introduction

[1] In the court below the appellant was the defendant while the respondent herein was the plaintiff.

[2] This is an appeal by the appellant against the decision of the learned High Court Judge allowing the appeal by the respondent against the decision of the learned senior assistant registrar allowing the application of the appellant to strike out the action of the respondent pursuant to O. 18 r. 19 of the Rules of the High Court 1980.

[3] On 13 June 2005 we allowed the appeal of the appellant with costs.

[4] The respondent is now appealing to the Federal Court thereby warranting us to give the reasons for our decision. We do so now.

The Background Facts Not In Dispute

[5] The core of the dispute is on the sale of shares in a company called SBBS which was formerly known as Syarikat Binaan Budi Sawmill Berhad, a company involved in logging business.

[6] At all material times the respondent was the Managing Director of the SBBS.

[7] On or around 18 October 1994 an attempt was made to float SBBS on the Second Board of the then Kuala Lumpur Stock Exchange (KLSE). It was unsuccessful. A second attempt was then made when the respondent sought the assistance of the appellant.

[8] To succeed in the float the respondent was required to comply with several requirements by the Securities Commission (SC), the KLSE and the relevant provisions of the Companies Act 1965 and the Securities Commission Act 1993.

[9] Accordingly the respondent had to execute the following statutory declarations and delivered the same to SC and KLSE:

i. a statutory declaration affirmed on 16 August 1996 in which the respondent affirmed that 'save for the interest which has been disclosed in writing to the SC (Securities Commission) I have no other interest (whether beneficial or otherwise and whether direct or indirect) in Syarikat Binaan Budi Sawmill Berhad.';

ii. a statutory declaration affirmed on 9 May 1997 whereby the respondent affirmed and declared to be true the following statements:

   a. 'I am fully aware of the spirit and objectives of the Malaysian Government's New Development Policy (NDP), in particular with regard to the minimum of 30% Bumiputera equity participation in Malaysian incorporated companies;

   b. I will fully abide by and strictly comply with both the letter as well as the spirit of the abovesaid NDP's requirement on Bumiputera participation in the equity of the said company or any successors in title;

   c. I confirm that I have and will not appoint a Bumiputera nominee/nominees in respect of the equity which I hold in the abovenamed company or any part thereof; and

   d. I further confirm that I make this declaration with full knowledge of the provisions of s. 32B and 32(6) of the Securities Commission Act 1993 and the implications thereof.

[10] The appellant in turn executed similar statutory declarations dated 22 January 1997 and 3 May 1997.

[11] SBBS was successfully listed in the Second Board on or around 7 July 1997.

The Claim

[12] The thrust of the claim by the respondent is that he being the wholly beneficial owner of the shares in SBBS the appellant was merely a trustee of the shares held by her in SBBS.

[13] In his statement of claim the respondent asserted as follows:

a. that in or around 1996 he purchased more shares of SBBS from then existing shareholders of SBBS;

b. the appellant expressed interest in purchasing 170,000 shares in SBBS and the respondent agreed to sell;

c. the 170,000 shares were then transferred and registered in respondent for those shares;

d. accordingly the respondent sought for the return of the 170,000 shares since they belonged to him at all times and thus the Bonus Issues Shares of 2,225,406.25 and 2,006,000 Rights Issues Shares arising therefrom issued to the appellant also belonged to the respondent;

e. the respondent also claimed the repayment of the sum of the sum of RM1,172,720 allegedly loaned to the appellant to purchase the Rights Issue Shares; and

f. the respondent also made an alternative claim for damages to be assessed by the court at current value of SBBS's shares, costs and such further and other relief as the court deem fit.

[14] Before us learned counsel for the appellant took the stand that even accepting as correct the contents of the statement of claim of the respondent the issue for determination should be whether the transaction or contract between the appellant and the respondent was illegal.

[15] Learned counsel for the respondent in accepting the issue for determination went on to submit that it was incumbent upon the appellant to prove that the primary object of the sale and purchase agreement entered into between the parties was to practise deception upon the provisions of the law.

Illegality Of The Transaction

[16] As the legality or illegality of the transaction, whether in the form of trust or contract, would determine the standing of the claim of the respondent against the appellant, we proceeded to hear the appeal on that premise alone.

[17] As alluded to earlier on, learned counsel for the appellant took the position to accept as correct all the assertions in the statement of claim of the respondent. There was also no rebuttal by the respondent as to the truth of the averment that he affirmed several statutory declarations containing assertions which would have given the impression to the listing approving authorities that the transaction was genuine. Thus we were and are of the view that this case falls squarely within one of the legal principles endorsed by this court in *Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors And Another Appeal* [2000] 3 CLJ 341.

[18] In *Fusing Construction Sdn Bhd (supra)* there were two suits filed, namely, the Tawau suit and the Limbang suit, which were heard jointly by the trial court in Kota Kinabalu Sabah. Briefly the facts were these: Fusing was the registered owner of two properties, one piece situated in Tawau Sabah hence the Tawau suit and the other in Limbang Sarawak hence the Limbang suit. EON Finance (the 1st defendant in the court below) occupied the Tawau property while EON Bank (the 3rd defendant in the court below) occupied the Limbang property. The two financial institutions required premises to open their respective branches in the two towns. The two properties were therefore acquired by the two financial institutions but through the assistance of one Sia (the 2nd defendant in the court below) for the purpose of portraying to Bank Negara an impression that EON Finance and EON Bank were engaged in a genuine loan transaction. This move was made in view of the directive issued by Bank Negara that financial institutions must maintain certain capital adequacy ratio and the purchase of the properties would have affected the capital adequacy ratios of these two financial institutions. To get around the impediment sometime in 1982 EON Bank contrived a scheme

which was implemented in May 1983. It involved the purchasing of the Tawau property and the Limbang property with funds provided by EON Bank. However, it was presented to the authorities that the fund was a loan from EON Finance and thus no depletion of capital was apparent.

[19] It was thus in accordance with the scheme that money was given to Sia who paid for the purchase of the two properties and had them registered in the name of Fusing. In turn Fusing was supposed to charge them with EON Finance for a loan to repay EON Bank with Sia as the conduit. Fusing was also to lease the properties to EON Finance and EON Bank respectively and then to use the rentals to repay the loan secured by the charges over the two properties.

[20] As events turned out, the charges over the two properties were not executed though the properties were purchased and registered in the name of Fusing and the leases created as planned. Each lease was for ten years.

[21] After the expiry of the leases, Fusing commenced the two actions for vacant possession and also for a declaration that it was not only the registered proprietor but also the beneficial owner of both properties. In response EON Finance and EON Bank respectively mounted a counterclaim seeking for a declaration that each was the beneficial owner of the respective properties.

[22] After a trial in which witnesses were called, the learned judge, despite his finding that the scheme was a disguise and a circuitous path to channel the fund for the purchase of the properties so as to give it some semblance that the fund was a loan to Sia rather than for buying the properties, found for Fusing in the Limbang suit on the sole ground that there had been a declaration of trust which had not been evidenced in writing and was therefore unenforceable by reason of the Statute of Frauds which the learned trial judge accepted, applied to the State of Sarawak.

[23] The learned trial judge, however, found against Fusing in the Tawau suit. He dismissed its action and granted the counterclaim in favour of EON Bank.

[24] On appeal there were three issues before the court, namely (i) whether, having regard to the facts and circumstances of the case, an express trust had been created; (ii) whether the learned

judge was right in holding that the Statute of Frauds applied in the State of Sarawak but did not apply in the State of Sabah; and (iii) whether the express trust, if any, was illegal and therefore unenforceable. The court dealt with only the first and third issues.

[25] In respect of the first issue the court found that there was an express trust created. But, in relation to the third issue, it was 'hopelessly bad' and it was 'illegal from the very start'. The reason for finding illegality was not one of statutory illegality but that 'Bank Negara, a public authority, had been deceived and that the primary object of the entire exercise was to practise such deception'. The court accepted the legal principle postulated in the case of *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170 which held that where 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end, the transaction is tainted with illegality, and is unenforceable'.

[26] So too in the instance case where it was not denied that the statutory declarations affirmed by the respondent and the appellant contained assertions which, if juxtaposed with the assertions by the respondent in the statement of claim, must have been intended at the material time to mislead SC and KLSE to approve the floating of SBBS on the Second Board.

[27] Hence, in our view the purported sale of the shares in SBBS from the respondent to the appellant amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end.' There was indeed a deception practised on the relevant approving bodies which were part and parcel of the public administration in this country. Indeed the respondent had come to seek for assistance from the court with unclean hands. The transaction was therefore tainted with illegality right from the start and thus unenforceable.

[28] As in *Fusing Construction Sdn Bhd (supra)* the question of the role played by the appellant in the impugned transaction would be quite irrelevant. The appellant was already the registered owner of the shares and she denied that they belonged to a third party much less to the respondent. In any event the consequential that usually follows in any declared illegal transaction is commonly denoted by the maxim 'the loss lies where it falls'. Thus, in this case it is inevitable but to say: 'let the transacted shares and the rights and bonus issues shares lie where they fall'.

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Conclusion

[29] Accordingly we had no difficulty in coming to our decision that this appeal should be allowed with costs. Consequently the application by the appellant to strike out the action by the respondent should be allowed in terms thereof.

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